No. 47101-9-II

Pierce County Superior Court Cause No. 13-2-06890-2

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JOHN C. ZIMMERMAN, SUSAN LASALLE, and FNM CORP., INC.
Respondents/Cross-Appellants

v.

SHARON D. ROSE (formerly STANCLIFF), in her capacity as Personal Representative of the Estates of Wilma W. Rose, deceased, and Robert E. Rose, deceased,
Appellant/Cross Respondent.

JOHN C. ZIMMERMAN, SUSAN LASALLE, AND FNM CORP., INC.'S CROSS-APPELLANTS/RESPONDENTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES (Cont.)

CASES (Cont.)

CASES (Cont.)

STATUTES

RULES

RULES (Cont.)

I. INTRODUCTION

This appeal and cross-appeal arise from a "mini" bench trial limited to the validity of Cross-Appellants/Respondents John C. Zimmerman, Jr., ("John, Jr."), Susan LaSalle ("Susan"), and FNM Corp., Inc.'s ("FNM") (collectively "Zimmerman") [1] affirmative defenses including statute of limitations and res judicata. Appellant/Cross Respondent Sharon D. Rose's ("Sharon") is the plaintiff and filed the underlying action as personal representative of the estates of her deceased parents, Wilma W. Rose ("Wilma") and Robert E. Rose ("Robert") (together, the "Roses"). Sharon's claims stem from a July 2000 conveyance of a five acre parcel of real property in Puyallup, Washington (the "Five Acre Parcel").[2]

Over the course of a three day bench trial in December 2014, the parties presented evidence and testimony regarding a series of real estate

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[1] For readability, Zimmerman is used in the singular form, albeit while referring collectively to John, Jr., Susan and FNM.

[2] The mini-trial addressed Sharon's then-remaining claims for Conversion, Breach of Fiduciary Duty, Fraud/Misrepresentation, Violation of Consumer Protection Act, and Breach of Express Trust. At or before trial, Sharon had dismissed her other claims for Breach of Contract, Quiet Title, Breach of Constructive Trust, and Violation of Uniform Fraudulent Conveyance Statute. *See* Letter Ruling at 1-2 (CP 129-30).

transactions originating more than twenty years ago. Based on this substantial evidence, the trial court determined correctly that the statutory limitation period for each of Sharon's causes of action had expired before Sharon filed suit on February 28, 2013—*i.e.*, nearly 13 full years after the July 2000 conveyance of the Five Acre Parcel. However, the trial court subsequently erred by denying Zimmerman's request for attorneys' fees despite the "prevailing party" fee provisions in the subject Rose Joint Venture Agreements and the 2011 Settlement Agreement.[3]

With respect to Sharon's appeal, Zimmerman respectfully requests that this Court affirm the trial court's December 11, 2014 letter ruling dismissing the case in its entirety (CP 129-32) and related Order of Dismissal (CP 133). On cross-appeal, Zimmerman requests that this Court reverse and vacate the trial court's February 27, 2015 Order Denying Defendants Motion for Fees and Costs (CP 247-48) (Appendix A) and related April 2, 2015 Order on Motion for Reconsideration of the Motion for Fees and Costs (CP 299) (Appendix B). Zimmerman further requests that this Court remand with instructions directing the trial court to enter an

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[3] Zimmerman appeals the denial of a fee award (CP 297); Sharon appeals the dismissal of her claims. (CP 134)

order awarding Zimmerman attorneys' fees and costs as the prevailing party in this action.

II. ASSIGNMENTS OF ERROR

A. Issues pertaining to Sharon's assignments of error.

Zimmerman does not assign error with respect to the trial court's correctly decided December 11, 2014 letter ruling dismissing the case in its entirety (CP 129-32) and related Order of Dismissal (CP 133), which Sharon has appealed. The following issues pertain to Sharon's assignments of error:

1. Whether this Court should affirm the trial court's factual determinations underlying its decision to dismiss Sharon's claims where:

    a. Each factual determination is amply supported by substantial evidence in the record on appeal. (*See* Section IV((B)(1), *infra*)

    b. Sharon's challenge to the trial court's factual finding no. 10 based the Deadman's Statute, RCW 5.60.030, is without merit. (*See* Section IV((B)(2), *infra*)

2. Whether this Court should affirm the trial court's factual determinations underlying its decision to dismiss Sharon's claims against Zimmerman arising from the 2000 conveyance of the Five Acre Parcel based on the trial court's correct finding that the Rose Joint Venture never owned an interest in the Five Acre Parcel. (*See* Section IV(C), *infra*)

3. Whether this Court should affirm the trial court's dismissal of Sharon's claims against Zimmerman on statute of limitations grounds where:

a. Viewing the evidence in the light most favorable to Zimmerman as the prevailing party, dismissal of Sharon's causes of action arising from the 2000 conveyance of the Five Acre Parcel was proper because the claims accrued in July 2000 when the Roses knew of their alleged damages and therefore the applicable limitations period began to run in July 2004 and therefore were not tolled by Robert's subsequent incapacitation in August 2005 (*See* Section IV(D)(1), *infra*)

b. Even assuming (but not conceding) that Sharon's claims were tolled by Robert's disability the claims are time barred because as a matter of law Robert's disability terminated no later than the date of his death on April 19, 2008 and from that date the limitations period for each cause of action expired before Sharon filed suit in 2013. (*See* Section IV(D)(2), *infra*)

4. Even assuming (but not conceding) that each cause of action is not time barred, whether Sharon's claims against Zimmerman are barred under principles of res judicata. (*See* Section IV(E), *infra*)

B. Zimmerman's assignments of error on cross-appeal and issues related thereto.

Zimmerman seeks cross review of, and assigns error to, the trial court's entry of its February 27, 2015 Order Denying Fees and Costs (CP 247-48) (Appendix A) and related Order on Motion for Reconsideration (CP 299) (Appendix B). The following issues pertain to Zimmerman's assignment of error on cross-appeal:

5. Whether this court should reverse and vacate the trial court's February 27, 2015 Order Denying Fees and Costs (CP 247-48) and the related Order on Motion for Reconsideration (CP 299) (Appendices A and B) where:

a. Zimmerman is entitled to fee award because all of Sharon's claims stem directly from the Rose Joint Venture Agreement and the related May 2011 Settlement Agreement which contains a prevailing party fee provision. (*See* Section V(A), *infra*)

b. The prevailing party provisions in Paragraph 8.10 of Rose Joint Venture Agreement and Paragraph 18 of the May 2011 Settlement Agreement apply even though Sharon elected to waive arbitration. (*See* Section V(B), *infra*)

c. Zimmerman's motion was proper under RAP 5.2(a) (*see* Section V(C), *infra*) and timely under CR 54(d)(2) (*see* Section V(D), *infra*).

C. Issues pertaining to assignments of error in both Sharon's appeal and Zimmerman's cross-appeal.

The following issue pertains to the assignments of error in both Sharon's appeal and Zimmerman's cross-appeal:

6. Whether this Court should award Zimmerman attorneys' fees and costs on appeal pursuant to RAP 14.1 *et seq.* and RAP 18.1 where Paragraph 8.10 of Rose Joint Venture Agreement and Paragraph 18 of the 2011 Settlement Agreement provide for an award of attorneys' fees and cost to the prevailing party. (*See* Section V, *infra*)

III. STATEMENT OF THE CASE

In the early 1990's, Wilma and Robert were residents of a newly developed mobile home park in Puyallup called Cornerstone Three. Wayne Semke ("Wayne") was the manager of the entity that developed

Cornerstone Three. John, Jr. was an employee hired by Wayne to manage Cornerstone Three.[4]

For many years Robert worked with John, Jr. in managing the mobile home park, acting as John, Jr.'s eyes and ears, and generally helping to maintain the park. Robert invested funds with Wayne in the mobile home park in the early 1990's so he had an incentive to ensure the upkeep of the mobile home park.

Sharon alleges in this lawsuit that her now deceased parents entered into a Joint Venture with FNM in 1999 and 2000 (as a part of a larger real estate development) to develop real property located in Puyallup, Washington. She further claims that FNM breached its contracts with her parents, and that John, Jr. and FNM violated their fiduciary duties to her parents with respect to how Zimmerman managed the Five Acre Parcel. However, as the trial court correctly determined, neither the Roses nor the Rose Joint Venture ever owned or had any interest, contractual,

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[4] This is a factually complex case with relevant facts originating more than twenty years ago and involving claims brought by Sharon on behalf of her parents, Wilma and Robert, who have been deceased for over seven years. The Statement of the Case is limited to facts pertinent to the cross-appeals, and does not address the many allegations regarding John Jr., which he denies.

legal or beneficial, in the Five Acre Parcel; their "interest" was in a completely different and distinct parcel of real estate, namely six acres of a 12 acre parcel located next to the Five Acre Parcel (tax parcel no. 0420203002) (the "Six Acre Parcel").

Below is a timeline of pertinent events:

01/01/1999 Ex. 13[5]	Rose Joint Venture Agreement signed between the Roses and FNM Corp. in which $300,000 was allegedly invested by the Roses in a "beneficial interest" in 6 of 12 acres held by the Port of Tacoma Estates III ("PT-III") as a part of the Ashley Meadows Joint Venture ("AMJV").
01/01/2000 Ex. 14	Effective date of amended Rose Joint Venture Agreement between the Roses and FNM in which the investment amount was increases to $314,000 for a "beneficial interest" in 6 of 12 acres held by PT-III as a partner of AMJV.
RP 100:13-18 RP 101:7-10	Sharon testified that she did not know what real property was involved in the Rose Joint Venture, and she did nothing to investigate to figure it out.
07/26/2000 Ex. 22 Ex. 23 RP164:1-12	John, Jr. purchased the Five Acre Parcel which included a home for appraised value ($282,500) from AMJV by warranty deed executed by Wayne, recording no. 200007280352. AMJV recognizes the gain from the sale of the Five Acre Parcel on its 2000 tax return that was distributed to all joint venturers, including the Roses, who were also issued K-1's.

[5] Exhibit citations refer to the trial exhibits which the trial court clerk provided to this Court as part of the record along with the numbered clerk's papers.

08/05/2004 Exs. 2, 3, 5 & 45 RP 349:10-14 RP 343:11-19	Sharon and her parents see attorney Megan Farr ("Farr") for estate planning assistance. New wills executed and Rose Family Living Trust revoked and property transferred back to them personally. Farr testified that as of 08/05/2004 both Robert and Wilma had testamentary capacity and contractual capacity. She also referred the Roses (including Sharon) to attorney Stuart Morgan ("Morgan") for assistance with their concerns about Robert's investments with the Rose Joint Venture.
12/17/2004 Exs. 7 & 8 RP 73:11-20 RP 81:4-7	Sharon hires attorney Morgan to investigate her concerns regarding her parents' investments with Zimmerman. Sharon did not trust John, Jr. in 2004, she saw "red flags" with her parent's investments with John, Jr. She told attorney Farr about her concerns. Sharon told attorney Morgan that she had concerns about her parent's investments with John, Jr.
12/22/2004 RP 84:22-24	John, Jr. responds to Morgan's inquiries with a letter. Sharon was not satisfied with John, Jr.'s response and she told Morgan that.
1/25/2005 Ex. 8	Morgan writes John, Jr. stating that "… your December 22, 2004 letter to me does not alleviate the concerns I expressed in my December 17, 2004 letter to you," and that if a better response was not received he would recommend to his clients that they pursue legal action.
01/27/2005 Ex. 9	John, Jr. responds with a lengthy letter explaining in detail Robert's investments and attached many pages of financial reports.
RP 306: 8-14	Morgan did not believe that John, Jr.'s 01/27/2005 response was adequate, and it did not satisfy his concerns.
RP 89:17-20	Sharon did not believe that the 1/27/2005 letter from John, Jr. was an adequate explanation of her father's investments or where the money went. Her concerns were not satisfied.

10/13/2005 Ex. 11 & 12	Robert and Wilma execute codicils to their wills to exclude their second daughter from a significant portion of their estate. Drafted by attorney Farr.
RP 350:17-24	Farr believed that at the time the codicils were executed (10/2005) both Robert and Wilma had both testamentary and contractual capacity.
10/31/2005: Ex. 35	Sharon informs John, Jr. that she has General Power of Attorney for her parents to execute business on their behalf. Copy to Morgan.
06/03/2006 Complaint, CP 1, p.1, ¶ 1	Wilma passed away. Probate commenced 10/06/2006, Pierce County Cause No. 06-4-01555-2
4/19/2008 Complaint, CP 1, p.2, ¶ 2	Robert passed away. Probate commenced 02/01/2011, Pierce County Cause No. 11-4-00162-2.
02/03/2010 RP 373:15-25, 374: 1-3. Ex. 17	Sharon testifies that as of January 22, 2010 she believed that John, Jr. was only acting in his own interest rather than in the interest of the investors and she did not trust him. Sharon votes to remove John, Jr. from his management position.
03/19/2010, Ex. 32	First Northern Investment Group (FNIG) filed a complaint against John, Jr. and others, on behalf of AMJV, seeking to quiet title to Five Acre Parcel. Pierce County Superior Court Cause No. 10-2-07610-2 ("2010 litigation").
04/01/2010 Exs. 22 & 46	John Zimmerman, Sr. ("John, Sr.") purchases Five Acre parcel from John, Jr., and pays fair market value. Recording no. 201004010531.

05/05/2011 Ex. 33	AMJV and FNIG signed a settlement agreement dismissing 2010 litigation against John, Jr. and John, Sr. with prejudice; claims of breach of fiduciary duty were dropped; the settlement agreement provided 5 year option to AMJV to purchase three acres of the Five Acre property; the *lis pendens* was released. AMJV releases the claims to the Five Acre Parcel with regard to all of its affiliates, which includes the Roses and Rose Joint Venture.
11/04/2011 Ex. 36	Receiver appointed by Court - promissory note secured by deeds of trust against the joint venture real properties in default.
01/11/ 2013 Ex. 37	Receiver transferred via special warranty deed AMJV's 12 Acre Parcel (which included the Six Acre Parcel) along with approximately 70 additional acres for $2,032,500 to Stewart Crossing LLC.
2/28/2013 Complaint	Dissatisfied with the fate of her parents' investment in the Rose Joint Venture, Sharon filed this lawsuit against AMJV manager Wayne and John, Jr. and John, Sr., among other defendants, alleging her right to the Five Acre Parcel which was purchased by John, Sr.
02/16/2014	Sharon served John, Jr. with amended complaint. (first service)

On February 28, 2013, Sharon filed this lawsuit seeking to quiet title to the Five Acre Parcel now owned by John, Sr.[6] Sharon also brought claims of breach of fiduciary duty relating to John, Jr.'s purchase of the Five Acre Parcel in the year 2000, with allegations in the alternative that

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[6] The clerk's paper number is not yet available as Zimmerman is concurrently supplementing the record to include the Complaint.

either the Five Acre Parcel was a part of the Six Acre Parcel or John, Jr. entered into the transaction without Robert's and Wilma's consent.

Rose filed the operative Third Amended Complaint on May 28, 2014. (CP 1-118) The causes of action in the operative Third Amended Complaint all stem from the Rose Joint Venture Agreement. *See* Complaint. (CP 1-118)

Of paramount importance, Sharon's Fourth Cause of Action for Breach of Contract specifically seeks relief based on the Rose Joint Venture Agreement.[7] (CP 14-15) Further, the operative Third Amended Complaint demonstrates that all of the other causes of action stem directly from the existence of the Rose Joint Venture Agreement. In other words, but for the Rose Joint Venture Agreement, this lawsuit would not have been filed; the Rose Joint Venture Agreement was the business transaction that brought the parties together and was at the heart of every single cause

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[7] Throughout the action, Sharon has asserted a claim for Breach of Contract based on the Rose Joint Venture Agreement. It is noteworthy that Sharon prosecuted this claim up and through the bench trial, after which the Court dismissed the Breach of Contract claim as, after presentation of the evidence on the final day of trial, Sharon conceded that the Breach of Contract claim was barred by the statute of limitations. (RP 403:11-13) As a result, Zimmerman should be entitled to the benefits of the prevailing party provision contained in Paragraph 8.10 of the Rose Joint Venture Agreement.

of action in Sharon's complaint. As but one example, the Second Cause of Action for Constructive Trust and Breach of Express Trust specifically highlights the existence of the Rose Joint Venture Agreement as a basis for establishing the alleged liability. *See* Third Amended Complaint at 12, ¶ 23. (CP 12)

On July 25, 2014, this Court ordered a "mini-trial" regarding Zimmerman's statute of limitations, res judicata, and collateral estoppel affirmative defenses. This mini-trial was held in December 2014.

On December 11, 2014, the trial court issued a letter ruling dismissing the case in its entirety (CP 129-32) and entered an Order of Dismissal (CP 133). Sharon appealed this ruling. On February 27, 2015, the trial court entered an Order Denying Defendants Motion for Fees and Costs. (CP 247-48) On April 2, 2015, the trial court entered an Order on Motion for Reconsideration of the Motion for Fees and Costs. (CP 299) Zimmerman timely appealed these rulings. (CP 297-99)

IV. ARGUMENT—SHARON APPEAL

A. Standard of review; harmless error.

The substantial evidence standard governs review of a trial court's factual determinations, as follows:

> When a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports its findings of fact and, if so, whether the findings support the trial court's conclusions of

> law. *Keever & Assocs. v. Randall*, 129 Wn. App. 733, 737, 119 P.3d 926 (2005). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). We review only those findings to which appellants assign error; unchallenged findings are verities on appeal.[11] *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). On appeal, **we view the evidence in the light most favorable to the prevailing party and defer to the trial court regarding witness credibility and conflicting testimony**. *Weyerhaeuser v. Tacoma-Pierce County Health Dep't*, 123 Wn. App. 59, 65, 96 P.3d 460 (2004).

Hegwine v. Longview Fibre Co., Inc., 132 Wn. App. 546, 555-56, 132 P.3d 789, 793-94 (2006) aff'd, 162 Wn.2d 340, 172 P.3d 688 (2007) (emphasis added; italics in original).

Questions of law are subject to de novo review. *Kim v. Lee*, 145 Wn.2d 79, 86, 31 P.3d 665, 668, as amended (Dec. 12, 2001), opinion corrected, 43 P.3d 1222 (2001). Mixed questions of law and fact are subject to the following standard of review:

> Mixed questions of law and fact, or law application issues, involve the process of comparing, or bringing together, the correct law and the correct facts, with a view to determining the legal consequences. As we said in Daily Herald Co. v. Department of Employment Security, 91 Wn.2d 559, 561, 588 P.2d 1157 (1979), mixed questions of law and fact exist "where there is dispute both as to the propriety of the inferences drawn by the agency from the raw facts and as to the meaning of the statutory term". We have invoked our inherent power to review de novo those issues. […] De novo review in these cases refers to the inherent authority of this court to determine the correct law, independently of the agency's decision, and apply it to the

> facts as found by the agency and upheld on review by this court.

Franklin Cnty. Sheriff's Office v. Sellers, 97 Wn.2d 317, 329-30, 646 P.2d 113, 119 (1982) (bracketed ellipsis added); *see also Rasmussen v. Employment Sec. Dep't of State*, 98 Wn.2d 846, 849-50, 658 P.2d 1240, 1242 (1983) (citation omitted).

B. This Court should affirm the trial court's factual determinations underlying its decision to dismiss Sharon's claims against Zimmerman because each factual determination is supported by substantial evidence on the record.

1. The trial court's findings are supported by substantial evidence on the record.

Again, unchallenged findings of fact are "verities on appeal", *i.e.*, accepted as true by the Court of Appeals. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 556, 132 P.3d 789 (2006). The following findings of fact are unchallenged, and therefore, must be accepted as true on appeal:

No.	Finding of Fact
1	There is insufficient evidence of any incapacity or disability as of 1999 and 2000 when Wilma and Robert (parents of the current plaintiff, Sharon, who pursues these claims in her capacity as personal representative of their estates) entered into Rose Joint Venture Agreements and invested in FNIG.
2	Robert declined in his cognitive abilities over time. Not earlier than June 2004 and not later than August 2005, he no longer had contractual capacity. There is insufficient evidence as to whether Wilma ever lacked capacity, but the testimony was that she deferred to Robert's decisions with regard to their investments and participation in the Rose Joint Venture Agreements/AMJV.
4	Sharon Rose had concerns about her parents' financial/real estate transactions with John Zimmerman, Jr. in late December 2004. Her

	parents had previously met with their estate planning attorney, Farr, who referred them to Morgan to address their financial transactions. Ms. Farr had concerns in 2004 as to the ability of Robert and Wilma to understand the nature of their investments with FNIG and the Rose Family Joint Venture's participation with the AMJV.
5	Sharon Rose was copied on correspondence sent by Morgan on behalf of Robert and Wilma to John, Jr. in December 2004 and January 2005 requesting information with regard to Robert and Wilma's investments. She received a copy of Zimmerman Jr.'s response letter of January 27, 2005. Sharon Rose did not trust John Zimmerman, Jr. as of that date and was not entirely satisfied with the information he provided in response to Morgan's inquiries.
6	Not later than October 2005, Sharon Rose had Power of Attorney to manage her parent's financial affairs.
7	The July 2000 conveyance of the Five Acre parcel from the Port of Tacoma III group to John Zimmerman, Jr. and his wife was publicly recorded.
9	Although the Roses were personal investors in First National Investment Group (FNIG), they never had any managerial or voting control in that entity.
13	At no time did Sharon Rose ever seek to intervene in the 2010 lawsuit while it was pending.

See Letter Ruling at 2-3. (CP 130-31)

Sharon assigns error to the trial court's finding of fact numbers 3, 8, 10, 11 and 12. *See* Appellant Brief at 1-2; Order (CP 129-32) To the contrary, each finding is supported by substantial evidence as follows:

Finding of fact no. 3
Robert's disability, if any, expired not later than his death on April 19, 2008. Arguably, it expired when Sharon Rose obtained his Power of Attorney. To the extent Wilma was ever disabled or lacking in capacity, such disability expired not later than her death in June 2006. **Substantial Evidence:** • Robert had testamentary and contractual capacity in August 2004 and October 2005 when he updated his estate plans. (Exs. 2, 5, 11, 45; RP 350:11-24) • Robert died on April 19, 2008. Complaint at 2, ¶ 2. • Wilma died on June 3, 2006. Complaint at 1, ¶ 1. **Note** With respect to finding of fact no. 3, Sharon only assigns error to the "finding that Robert Rose's lack of contractual capacity expired when Sharon rose obtained his power of attorney." *See* Appellant Brief at 1. Sharon does not challenge the finding that Robert died on April 19, 2008, the correct date which is supported by the record. *See*, *e.g.*, Third Amended Complaint at 2 (CP 2) **However, in an apparent mistake, in the Appellant Brief Sharon repeatedly identifies the date of Robert's death incorrectly as April 19, 2009.** *See* Appellant Brief at 14, 16, 17.
Finding of fact no. 8
Pursuant to the 01/01/1999 and 01/01/2000 Rose Joint Venture Agreements with FNM Corp (controlled by John Zimmerman, Jr.), the Rose Joint Venture was given a "beneficial" interest in one-half of a twelve acre parcel (6/12 acres) held by the Port of Tacoma III investors, however, the Rose Joint Venture was never given any managerial or voting control over Port of Tacoma III or the AMJV, in which Port of Tacoma III was a participant. **Substantial Evidence:** • No reliance of testimony prohibited by the Deadman's Statute was necessary because the information relied upon by the Court was contained in documents and John, Jr.'s testimony was from his personal knowledge of the transactions. • The legal description in the Rose Joint Venture Agreement although incomplete, clearly described the twelve acre parcel and not the Five Acre Parcel owned by John, Jr. (Exs. 13, 14, 15, 30 & 31) • Testimony of John, Jr. regarding the identification and location of the parcels was within his personal understanding and knowledge, and not a violation of the Deadman's Statute. (RP 294) • The Rose Joint Venture only had a 'beneficial interest' in 6 acres; it did not become a partner of or have voting rights in PT-III. (RP 294:20-25, 295:1-3, 299:10-20)

Finding of fact no. 10
The twelve-acre parcel which was the subject of the 1999 and 2000 Rose Joint Venture Agreements was a distinct and separate legal (though physically adjacent) parcel from the Five-Acre parcel which was conveyed by PTIII to John Zimmerman, Jr. in July 2000. **Substantial Evidence:** • Legal descript. of Rose Joint Venture Property - 6.0 Acres of 12.0 Acres of: • W ½ OF W ½ OF E ½ OF NW OF SW & E ½ OF E ½ OF W ½ OF NW OF SW & W 2 AC of E 15 AC of NW OF SW. (Exs. 13, 14, 15) • Legal descript. of 12 Acre Parcel (No.0420203002): W ½ OF W ½ OF E ½ OF NW OF SW & E ½ OF E ½ OF W ½ OF NW OF SW & W 2 AC OF E 15 AC OF NW OF SW. Section 20 Township 20 Range 04 Quarter 32. Ex. 30. • Legal descript. of Five Acre Parcel (No. 0420203055): BEG 198 FT W OF NE CORNER OF NW OF SW TH W 230.33 FT M/L TH S 00 DEG 15 MIN E 785.55 FT TH E 428.33 FT TH N 125.55 FT TH W 198 FT TH N 660 FT TO BEG LESS PETERSON CO RD, Section 20 Township 20 Range 04 Quarter 32. (Exs. 22 & 31) • Map of Real Estate development showing both parcels by parcel number. (Ex. 15)
Finding of fact no. 11
Sharon Rose was selected as one of five members of an advisory group with respect to the AMJV investors in 2009 and voted to oust John, Jr. as manager of that group on February 4, 2010. She was present at a meeting of certain AMJV investors on January 22, 2010 at which time concerns about John, Jr. and the viability of the AMJV investment were raised. **Substantial Evidence:** • Sharon was present at every advisory committee meeting. (RP 360-361:11-13) • Sharon voted to oust John, Jr. in February 2010. (Exs. 17 & 18) • Sharon voted to oust John, Jr. on 2/3/2010 from his management position because she believed that he was not acting in the best interests of the investors, but rather was acting in his personal interests. (RP 374) • Sharon believed that to be the case during the investor's meeting on 1/22/2010, in which a heated discussion occurred regarding John, Jr.'s leadership and the future of the real estate investments. (RP 375:14-19)

Finding of fact no. 12
Sharon Rose was aware of or should have been aware of a lawsuit filed under Pierce County Cause No. 10-2-07610-2 by FNIG against John, Jr. in March 2010 prior to or at the time it was filed. She was certainly aware of the suit prior to settlement and dismissal with prejudice of that suit in May 2011. **Substantial Evidence:** • Sharon present at every single advisory committee meeting. (RP 361:11-13). • Sharron testified that she knew of the lawsuit, and that it involved the Five Acre Parcel. (RP 132-33) • The lawsuit was discussed at advisory committee meetings. (RP 361-62) • She knew that the lawsuit was settled at the time it was settled. (RP 135) • Title to the Five Acre Parcel was quieted in John, Sr. in the settlement. (RP 362, 363)

2. Sharon's challenge to the trial court's factual finding no. 10 based the Deadman's Statute, RCW 5.60.030, is without merit.

With respect to the trial court's finding of fact no. 10 (*i.e.*, essentially that the Five Acre Parcel was not part of the Rose Joint Venture Agreements), Sharon incorrectly argues that alleging that the finding was made in reliance on testimony of John, Jr. in violation of Washington's Deadman's Statute, RCW 5.60.030. This assignment of error is without merit as there was no objection to this testimony at trial, the substantial documentary evidence supports the trial courts findings and Sharon through her own testimony has waived the application of the Deadman's Statute.

The purpose of the Deadman's Statute, RCW 5.60.30, is to "prevent interested parties from giving self-serving testimony about

conversations or transactions with the decedent." *Wildman v. Taylor*, 46 Wn. App. 546, 549, 731 P.2d 541 (1987). The purpose of the statute is to prevent the living from taking an unfair advantage of the estate of the dead. *Robertson v. O'Neill*, 67 Wash. 121, 120 P. 884 (1912). However, the Deadman's Statute only applies to statements by or transactions with the deceased; it does not apply to information contained in documents written or executed by the deceased person. *Hampton v. Gilleland*, 61 Wn.2d 537 (1963). Sharon did not object to the admission of any of the exhibits at trial.

Here, in making finding of fact 10, the trial court relied on the substantial evidence in the record by way of written documents to reach its correct finding that the Twelve Acre Parcel which was the subject of the Rose Joint Venture Agreement was a separate and distinct parcel from the Five Acre Parcel conveyed to John, Jr. in July 2000. This substantial evidence includes:

- Ex. 13 – the Rose Joint Venture Agreement, with incomplete, but understandable legal description
- Ex. 15 – the Lakes boundary map showing the different parcels
- Ex. 16 – the AMJV org. chart showing that the 5 Acre parcel was not owned by PT-III as of 11/20/ 2008
- Ex. 23 – AMJV corporate tax return showing that 5 Acre parcel sold in 7/2000
- Ex. 30 – Pierce County Assessor records with legal description of 12 acre parcel
- Ex. 31- Pierce County Assessor records showing legal description of Five Acre parcel

The testimony by John, Jr. regarding the tax returns was based upon his personal knowledge and understanding of those tax returns and from his participation in their preparation in the ordinary course of his employment, not by any transactions or conversations with the decedent. Further it was not objected to at trial. (RP 160:8-25, 161:1-25, 162:1-25 and 163:1-25 and 164:1-25) A statement by a witness regarding his own feeling, understanding or impressions does not come with in the definition of a "transaction" within the purview of the Deadman's Statute. *Jacobs v. Brock,* 73 Wn.2d 234(1968). Thus, there was no evidence admitted in violation of the Deadman's Statute on which the court needed to rely in reaching its conclusion.

Even if there was, any such error in the admission of testimony in violation of the Deadman's Statute, it was harmless, because there was sufficient documentary evidence to support the trial court's findings. Thus, the testimony of John, Jr., even if in violation of the Deadman's Statute, which it is not, was cumulative, and any error in its admission was harmless. *Latham v. Hennessey*, 12 Wn. App. 518 (1975).

Further, arguably Sharon waived the Deadman's Statute before the trial ever started. Sharon Rose submitted declarations in opposition to a Motion for Summary Judgment and in opposition to a 12(b)(6) Motion. At

trial, she testified about her father's business and personal relationship with John, Jr., about her parents desire to seek legal counsel in 2004 regarding their investments and the Rose Joint Venture, (RP 64-65) as well as her understanding of the meaning of the Rose Joint Venture Agreements. In doing so she waived the application of the Deadman's Statute to this proceeding. The statute may be waived if the adverse party introduces testimony on direct or cross examination regarding the transaction in question. *Zvolis v. Condos*, 56 Wn.2d 275, 277, 352 P.2d 809 (1960); O'Steen v. Estate of Wineberg, 30 Wn. App. 923, 935, 640 P.2d 28 (1982); Hill v. Cox, 110 Wn. App. 394, 41 P.3d 495 (2002).

C. The trial court's factual findings reveal that dismissal of Sharon's causes of action arising from the 2000 conveyance of the Five Acre Parcel was proper because the Rose Joint Venture never owned an interest in the Five Acre Parcel.

As set forth in Sections IV(D)(-(E) *infra*, the trial court correctly determined through the mini-trial that all of Sharon's claims with regard to the transfers of the Five Acre parcel were barred by the applicable statutes of limitation and that the Breach of Fiduciary Duty claim was barred by res judicata. Affirmative defenses aside, it is noteworthy that dismissal was also proper based on the trial court's finding that the Rose Joint Venture never owned an interest in the Five Acre Parcel.

To briefly explain, Sharon alleged in her lawsuit that the transfer of the Five Acre parcel to John, Jr. was in violation of the Rose Joint Venture Agreement. Her argument fails because the trial court correctly concluded at Finding of Fact 10 that the Five Acre Parcel conveyed to John, Jr. was a separate and distinct legal parcel from the 12 acre parcel referred to in the Rose Joint Venture Agreement. This conclusion was based upon a plain reading of the documents. (CP 131) Thus, Sharon had no interest in the Five Acre Parcel, and could not recover anything from Defendants as a result of its sale, and the lawsuit could have been dismissed on that basis alone. There is simply no evidence anywhere in the record that the Roses or the Rose Joint Venture ever held any interest in the Five Acre Parcel.

D. The trial court correctly dismissed the claims against Zimmerman as Sharon failed to timely file the claims within the applicable limitations period.

1. Dismissal of Sharon's causes of action arising from the 2000 conveyance of the Five Acre Parcel was proper because the claims accrued in July 2000 when the Roses knew of their alleged damages and therefore the applicable limitations period began to run in July 2004 and therefore were not tolled by Robert's subsequent incapacitation in August 2005.

The purpose of statutes of limitations is to shield defendants and the judicial system from stale claims. When plaintiffs sleep on their rights, evidence may be lost and memories may fade. *Crisman v. Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163 (1997). It is axiomatic that the applicable

statute of limitation period begins to run when the cause of action accrues. *See* RCW 4.16.005.

"Usually, a cause of action accrues when the party has the right to apply to a court for relief." *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423, 428 (2006), as corrected (Nov. 15, 2006) (citation omitted). Thus, "accrual of a contract action occurs on breach." *Kinney v. Cook*, 150 Wn. App. 187, 193, 208 P.3d 1, 4 (2009) (citation omitted). However, where the discovery rule applies to a cause of action, it accrues, and the cause of action begins to run, when the plaintiff knows, or reasonably should know, the factual basis for the cause of action; it is not necessary that the plaintiff be aware of the legal basis for the claim. *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 123 P.3d 465 (2005)

In this case, the discovery rule applies to the accrual of the statute of limitations in several of the causes of action alleged by Sharon, specifically violation of the consumer protection act and fraud. *Mayer v. Sto Industries*, Inc., 123 Wn. App. 443, 98 P.3d 116 (2004), decision aff'd in part, rev'd in part on other grounds, 156 Wn.2d 677, 132 P.3d 115 (2006); *see also* RCW 4.16.080(4).

Significantly, the discovery rule requires reasonable diligence on the part of the plaintiff. *Id.* The plaintiff bears the burden of proving that

due diligence would not have resulted in discovery of the facts constituting the claim within the applicable limitations period. *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000). Whether or not a plaintiff has exercised due diligence is generally a question of fact. Notice that would lead a diligent party to further inquiry is notice of everything to which such inquiry would lead. *Busenius v. Horan*, 53 Wn. App. 662, 769 P.2d 869 (1989).

In this case, there is ample evidence that the Roses knew about the July 2000 conveyance of the Five Acre Parcel at the time it occurred—at a minimum, Sharon and/or her deceased parents were on inquiry notice of the conveyance of the Five Acres to John, Jr. in July 2000, because the conveyance was publically recorded concurrently with the date of sale (Ex. 22), and John, Jr. was living in the house and performing extensive repairs. (RP 152:1-25; Ex. 23) When the facts upon which the fraud is predicated are contained in a writing that has been filed as a public record, the aggrieved party may be deemed to have received constructive notice of its contents, in which case the statute of limitations begins to run from the date of the filing of the writing. *Strong v. Clark*, 56 Wn.2d 230, 352 P.2d 183 (1960). But one is charged with constructive notice only if the fraud could have been discovered by examining the record, and if "ordinary prudence and business judgment" required examination of the record.

Aberdeen Federal Sav. & Loan Ass'n v. Hanson, 58 Wn. App. 773, 794 P.2d 1322 (1990).

This duty to investigate under circumstances where a reasonable business person could have and should have done so is sometimes known as "inquiry notice". *Douglass v. Stanger*, 101 Wn. App. 243, 2 P.3d 998 (2000) (periodic check of public records by investor in real estate project would have alerted him to fact that developer had wrongfully transferred property). In this case, had Sharon (or her agents) ever done a title search they would have immediately discovered that the Five Acre Parcel was sold and conveyed to John, Jr. in July 2000. This transaction was not hidden or concealed in any way; it was a simple matter of public record. Further Sharon believed that John, Jr. was untrustworthy, and she knew in at least 2004 that there were "court issues" with regard to her parents' investment with John, Jr. (RP 70:11-20). In 2004 she consulted two different attorneys regarding her concerns and neither Sharon nor her attorneys were satisfied with the answers provided by John, Jr. following her attorney's inquiries. She did not trust John, Jr. and saw many red flags regarding his involvement with her parents. (RP 73:11-12.) Due diligence would have absolutely and unequivocally revealed the July 2000 transfer of the Five Acres to John, Jr., and as a result Sharon did not meet her

burden to prove that that the necessary facts could not have been discovered in time.

Therefore, the discovery rule – which acts to postpone the running of the statute of limitations – does not apply. *Asuncion v. City Of Seattle*, 151 Wn. App. 1015 (2009). Indeed, "the discovery rule does not apply if the defendant can present uncontroverted facts showing that the plaintiff immediately knew of the damage, as the cause of action accrues when the plaintiff knows the factual, but not necessarily legal, basis for the cause of action." *Asuncion v. City of Seattle*, 151 Wn. App. 1015 (2009).

Accordingly, the applicable statutory limitations period for each claim began to run in July 2000. *Id.* In this regard, the statutory limitation period for each claim remaining at the time of the mini-trial is as follows:

Cause of Action	Limitation Period	Period Expires
Conversion	3 years. *See* RCW 4.16.080(2).	July 2003
Breach of Fiduciary Duty	3 years. *See* RCW 4.16.080(2), (3).	July 2003
Fraud	3 years. *See* RCW 4.16.080(4).	July 2003
Misrepresentation	3 years. See RCW 4.16.080(4).[8]	July 2003

[8] *See also* Sabey v. Howard Johnson & Co., 101 Wn. App. 575, 5 P.3d 730 (2000).

Cause of Action	Limitation Period	Period Expires
Consumer Protection Act[9]	4 years. *See* RCW 19.86.120.	July 2004
Breach of Express Trust	6 years. *See* RCW 4.16.040(1).	July 2006

The table reveals that, unless tolled, each statutory limitation period expired long before Sharon filed suit in February 2013. To combat this problem, Sharon argues that the running statute of limitations was tolled under RCW 4.16.190 because her parents were "disabled" since as early as 1995.

To the contrary, RCW 4.16.190 does not toll a limitations period unless the person asserting the limitations defense was incompetent or disabled "at the time the cause of action accrued." *See* RCW 4.16.190; *see also Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 268, 189 P.3d

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[9] The Consumer Protection Act claim could and should be dismissed on the merits. Indeed, to prevail in a private action under the Washington Consumer Protection Act, RCW 19.86 et seq. ("CPA"), Sharon must establish the five elements as set forth in *Hangman Ridge Stables, Inc. v. Safeco Title Insurance Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986), including a public interest impact.(failure to prove any one of the five elements dismisses a claim under the CPA). Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest. *Behnke v. Ahrens*, 172 Wn.App. 281 (2012). Here, there is no evidence in the record (not has Sharon alleged in her Complaint) that any alleged deceptive acts had any impact on the public interest or the public. Thus, the trial court was correct in concluding that the CPA does not apply to the facts to this case.

753, 756 (2008); *Giddings v. Greyhound Lines Inc.*, No. C11-1484-RSM, 2013 WL 4458239, at *3 (W.D. Wash. Aug. 16, 2013). In this regard, it is important to reiterate that the following unchallenged factual finding of the trial court must be accepted as true on appeal:[10]

> Robert declined in his cognitive abilities over time. Not earlier than June 2004 and not later than August 2005, he no longer had contractual capacity. There is insufficient evidence as to whether Wilma ever lacked capacity, but the testimony was that she deferred to Robert's decisions with regard to their investments and participation in the Rose Joint Venture Agreements/AMJV.

See Letter Ruling at 2, Finding No. 2. (CP 130); *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546, 555-56, 132 P.3d 789, 793-94 (2006) aff'd, 162 Wn.2d 340, 172 P.3d 688 (2007).

Unchallenged finding of fact number 2 establishes that because neither Robert nor Wilma were incompetent or disabled "at the time the cause of action accrued", the applicable limitations period was not tolled by Robert's subsequent disability which the trial court determined to be "[n]ot earlier than June 2004." *See* RCW 4.16.190; *see also Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 268, 189 P.3d 753, 756

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[10] Sharon only assigns error to the trial court's finding of fact numbers 3, 8, 10, 11 and 12. *See* Appellant Brief at 1-2; *see* also Letter Ruling at 2-3. (CP 130-31)

(2008); *Giddings v. Greyhound Lines Inc.*, No. C11-1484-RSM, 2013 WL 4458239, at *3 (W.D. Wash. Aug. 16, 2013). It follows that since each statutory limitation period expired long before Sharon filed suit in February 2013 (as shown in the table above), each of her claims were time barred. Robert's subsequent disability (sometime between or after June 2004 and August 2005) does not alter or affect this determination.[11]

2. Even assuming (but not conceding) that Sharon's claims were tolled by Robert's disability the claims are time barred because as a matter of law Robert's disability terminated no later than the date of his death on April 19, 2008 and from that date the limitations period for each cause of action expired before Sharon filed suit in 2013.

Assuming (but not conceding) that the causes of action did not accrue in July 2000 as set forth in Section IV(D)(1), *supra*, as set forth below under the discovery rule the causes of action would have accrued no later than the December 2004 through January 2005 timeframe. In this regard, Sharon does not challenge the trial court's factual findings number 2 that she had knowledge of the basis for her causes of action somewhere between December 2004 and January 2005:

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[11] Note that the Breach of Express Trust Claim is akin to a breach of contract claim and therefore necessarily accrued on breach; the discovery rule does not apply. *See* RCW 4.16.040(1).

> Sharon Rose was copied on correspondence sent by Morgan on behalf of Robert and Wilma to John, Jr. in December 2004 and January 2005 requesting information with regard to Robert and Wilma's investments. She received a copy of Zimmerman Jr.'s response letter of January 27, 2005. Sharon Rose did not trust John Zimmerman, Jr. as of that date and was not entirely satisfied with the information he provided in response to Morgan's inquiries.

See Letter Ruling at 2.[12] (CP 130)

In other words, by January 2005 Sharon had knowledge of the possibility of claims against Zimmerman. *Id.* The record further supports this determination. (RP 412:9-13) Therefore, Sharon's causes of action accrued at that point under the discovery rule, which provides as follows:

> The discovery rule may apply where the plaintiff does not immediately discover the injury. *Wallace v. Lewis County*, 134 Wn. App. 1, 13, 137 P.3d 101 (2006). The discovery rule postpones the running of the statute of limitations until the time when the plaintiff, through exercising due diligence, should have discovered the basis for the cause of action and the plaintiff knows or should know that the defendant is responsible. *Id.*; *Orear v. Intl. Paint Co.*, 59 Wn. App. 249, 257, 796 P.2d 759 (1990). Whether the plaintiff has exercised due diligence is a question of fact, which is the defendant's burden to prove. *Wallace*, 134 Wn. App. at 13, 137 P.3d 101.

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[12] Again, such an unchallenged finding is a verity on appeal that must be accepted as true. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 556, 132 P.3d 789 (2006).

Asuncion v. City Of Seattle, 151 Wn. App. 1015 (2009) (italics in original).

Of course, absent tolling, if the statutory limitations period for each cause of action accrued and began to run in January 2005 it would have expired long before Sharon filed suit in February 2013. *Id.* Thus, Sharon argues that because Robert was disabled at the time her claims accrued (again, the trial court determined that Robert became disabled between June 2004 and August 2005), the applicable statute of limitation period was tolled during the period of disability and apparently, thereafter. *See* Appellant Brief at 15-18.

The argument is unavailing. Even assuming the statute of limitations is tolled during a period of disability, the disability terminates upon death, because the disability no longer exists. Sharon acknowledges as much by conceding that Robert's disability was "a condition that lasted until his death." *See* Appellant Brief at 15. Likewise, under RCW 4.16.190, the tolling statute, disability is defined by RCW 11.88.010 in a fashion that by its express terms excludes the possibility that the condition of disability as to a "person" could occur while a person is deceased:

> For purposes of this chapter, a person may be deemed incapacitated as to person when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.

See RCW 11.88.010(a).

Accordingly, upon Robert's death in April of 2008, the statute of limitations for each (already accrued) cause of action would have begun to run. In this regard, if both a disability toll and the discovery-of-injury rule apply, the statute of limitations will not begin to run until the plaintiff knows of the harm or the disability is removed, whichever comes later. *E.R.B. v. Church of God*, 89 Wn. App. 670, 950 P.2d 29 (1998), rev'd on other grounds, 138 Wn.2d 699, 985 P.2d 262 (1999), as amended, (Sept. 8, 1999). Again, Sharon knew of the harm by January 2005. (CP 130; RP 412:9-13) Thus, in the scenario most generous to Sharon, the limitations period on her causes of action began to run the day after Robert's death, *i.e.*, April 20, 2008, and therefore expired before she commenced suit more than 4 years later in February 2013.[13]

Sharon's argument that RCW 4.16.200 somehow extends the limitations period to the date suit was filed also fails. *See* Appellant Brief at 15-18. RCW 4.16.200 merely provides that if the statute of limitations would otherwise have run on the obligation at anytime within the 1 year immediately following Robert's death, Sharon (as his personal

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[13] Again, the discovery rule does not apply to claim for Breach of Express Trust, which therefore expired in July 2006. *See* RCW 4.16.040(1).

representative) would in that event still have had a full year from the date of death within which to commence suit on the obligation. Likewise, Sharon's argument that RCW 4.20.046 somehow tolls or affects the limitations period is incorrect. *See* Appellant Brief at 15-18. RCW 4.20.046 does not relate or refer to disability tolling and merely preserves a person's causes of action for his/her personal representative.

In short, dismissal of Sharon's claims was proper because Robert's disability terminated no later than upon his death on April 19, 2008 and Sharon failed to timely bring her claims even assuming that she at that point had the benefit of the entire limitations for each claim.

E. Even assuming (but not conceding) that each cause of action is not time barred, Sharon's claims against Zimmerman is barred under principles of res judicata; the trial properly dismissed the breach of fiduciary claim on res judicata grounds.

Sharon's complaint is precluded by the prior action in Pierce County Superior Court, Cause No. 10-2-07610-2, which sought to quiet title to the Five Acre Parcel previously owned by John, Jr., alleged a breach of agreement, breach of fiduciary obligations, and fraudulent conveyance. The record is devoid of any evidence that Sharon's claims arose from different circumstances than the claims brought in the 2010 action or disputing that she was in privity with the plaintiffs in that proceeding. The 2010 litigation

ended with a final judgment that dismissed the claims of all plaintiffs with prejudice on July 26, 2011.

"Resurrecting the same claim in a subsequent action is barred by res judicata." *Gold Star Resorts, Inc. v. Futurewise,* 167 Wn.2d 723, 737, ¶ 32, 222 P.3d 791 (2009) (citation omitted). The doctrine prevents the plaintiff from relitigating the same claim against the same party in a subsequent action. *Feature Realty, Inc. v. Kirkpatrick & Lockhart Preston Gates Ellis, LLP,* 161 Wn.2d 214, 224, ¶ 14, 164 P.3d 500 (2007). Prior judgment bars litigation of a subsequent claim if the prior judgment has "a concurrence of identity with the subsequent action" in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. *Gold Star,* 167 Wn.2d at 737, ¶ 32. Different parties constitute the same party for res judicata purposes if they are in privity. *Feature Realty,* 161 Wn.2d at 224, ¶ 14 (citation omitted). "A nonparty is in privity with a party if that party adequately represented the nonparty's interest in the prior proceeding." *Id.* Although there is no specific test for privity, where corporations are involved, a subsidiary or limited partnership benefit from the rule if the parent company is dismissed. *Id.*, ¶ 15.

All four elements of res judicata are met here. First, the subject matter of both the 2010 action and Sharon's action is title to the Five Acre Parcel that Zimmerman owned from 2000 through 2010. See also the Third

Amended Complaint filed in this matter. (CP 1-118) Second, the cause of action in both the 2010 action and Sharon's action seeks to quiet title to the Five Acre property, judgment for damages, and to void the allegedly fraudulent conveyance. Third, Zimmerman is the defendant in both the 2010 action and this action. Sharon is a voting member of FNIG, the plaintiff in the 2010 action, and thus in privity with the company in the 2010 action. Furthermore, the Rose Joint Venture was a joint venturer with the AMJV and the Rose Joint Venture's property was subject to AMJV's control. In fact, Sharon was a member of the AMJV joint venture "advisory committee" that decided to support the 2010 litigation. There can be no question that Sharon knew of and participated in the 2010 litigation such that she has consented to the resolution of that proceeding. Finally, in both the 2010 action and this action, plaintiffs and defendants were/are represented by counsel.

In addition, Sharon has relied on the 2010 litigation from the inception of her case. Sharon's Third Amended Complaint (as well as the original, first amended, and second proposed amended complaint) attaches four declarations from the 2010 litigation. *See* Third Amended Complaint, Exs. I, J, K, and L. (CP 67-82) Sharon's third amended complaint also devotes an entire paragraph to the argument that a *lis pendens* was filed on March 19, 2010, two weeks before Zimmerman sold the Five Acre Parcel, thus putting Zimmerman on notice to claims against title. (CP 13) Sharon

cannot claim on the one hand that "every party in the world" was on notice beginning March 19, 2010 but on the other hand that she was not aware her claims were identical to the claims by FNIG, where prior to filing the complaint in March 2010, she voted as a member in FNIG as recently as January 2010, and as a member of the AMJV advisory committee in January 2010. Under fundamental preclusion principles, Sharon is precluded from bringing an identical action against Zimmerman a second time. *Lyle v. Haskins,* 24 Wn.2d 883, 904, 168 P.2d 797 (1946) ("A person may have such a connection with a … party thereto as to be bound by the final decree thereof, of which he has knowledge, even though he is not formally and specifically named a party to the suit.") (citation omitted).

Application of the doctrine of res judicata does not work an injustice against Sharon because she had every opportunity to pursue her claims in the prior proceeding and she elected to settle. The fact that hindsight resulted in her change in feelings about the settlement of that matter should not be an excuse for her to have a second opportunity to pursue the same defendants for an investment that was thoroughly explained to her as early as 2004.

V. ARGUMENT—ZIMMERMAN CROSS-APPEAL

A. Zimmerman is entitled to fee award because all of Sharon's claims stem directly from the Rose Joint Venture Agreement and the related May 2011 Settlement Agreement which both contain a prevailing party fee provision.

At the outset, it is important to emphasize that the causes of action in the operative Third Amended Complaint all stem from the Rose Joint Venture Agreement. *See* Complaint. (CP 1-118) Of paramount importance, Sharon's Fourth Cause of Action for Breach of Contract specifically seeks relief based on the Rose Joint Venture Agreement. (CP 14-15) It is noteworthy that Sharon prosecuted this claim up and through the bench trial, after which the Court dismissed the Breach of Contract claim as, after presentation of the evidence on the final day of trial, the Sharon conceded that the Breach of Contract claim was barred by the statute of limitations. In other words, throughout the action the Sharon's asserted a claim for Breach of Contract based on the Rose Joint Venture Agreement. As a result, Zimmerman should be entitled to the benefits of the prevailing party provision contained in Paragraph 8.10 of the Rose Joint Venture Agreement. (Ex. 13 at 10, Ex. 14 at 10)

Further, the operative Third Amended Complaint demonstrates that all of the other causes of action stem directly from the existence of the Rose Joint Venture Agreement. (CP 1-118) In other words, but for the Rose Joint Venture Agreement, this lawsuit would not have been filed.

Thus, Zimmerman is entitled to assert the prevailing party fee provision contained in the Rose Joint Venture because it is the venture directly responsible for the relationship among the parties. Indeed, the Rose Joint Venture Agreement was the business transaction that brought the parties together and was at the heart of every single cause of action in Sharon's complaint. As but one example, the Second Cause of Action for Constructive Trust and Breach of Express Trust specifically highlights the existence of the Rose Joint Venture Agreement as a basis for establishing the alleged liability. *See* Third Amended Complaint, ¶ 23. (CP 12-13)

In a related vein, Zimmerman is entitled to an award of fees based on the May 2011 Settlement Agreement, which also contains a prevailing party fee provision in its Paragraph 18. In this regard, the trial court correctly found in its letter decision filed December 11, 2014 that "Sharon Rose was aware or should have been aware of a lawsuit filed under Pierce County Cause No. 10-2-07610-2 by FNIG against John Zimmerman, Jr. in March 2010 prior to or at the time it was filed. She was certainly aware of the suit prior to settlement and dismissal with prejudice of that suit in May 2011." *See* December 11, 2014 Letter Decision at 3, ¶ 12. (CP 131) The trial court went on to state in its Conclusions of Law that "This claim involves the same subject matter, was a cause of action in the 2010 action involving the same parties and Sharon Rose was in privity with FNIG and

therefore represented in that litigation." *See* December 11, 2014 Letter Decision at 4, ¶ 7. (CP 132)

B. Although Sharon elected to waive the right to arbitration under the Rose Joint Venture Agreement Sharon remains bound by its prevailing party provision.

Zimmerman concedes that 1) a partnership agreement is the law of the partnership, *Diamond Parking, Inc., v. Frontier Bldg. Ltd. Partnership*, 72 Wn. App. 314, 317-18, 864 P.2d 954 (1993); 2) that agreements to arbitrate are valid, supported by public policy, and enforceable, *B & D Leasing Co. v. Ager*, 50 Wn. App. 299, 303, 748 P.2d 652 (1988); 3) if, despite an arbitration clause, one party initiates a court action, the other party is entitled to an order staying the litigation, *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules N.W., Inc.*, 28 Wn. App. 59, 61, 621 P.2d 791 (1980); and 4) parties may expressly or impliedly waive the right to arbitrate, however, "by failing to invoke the provision when an action is commenced, or by conduct inconsistent with any other intention but to forgo the right to arbitration." *B & D Leasing*, 50 Wn. App. at 303; *see also Shoreline Sch. Dist. No. 412 v. Shoreline Ass'n of Educ. Office Employees*, 29 Wn. App. 956, 958, 631 P.2d 996 (1981).

However, nothing in the above cases, which are still good law for the principal that arbitration may be waived by conduct of the parties and failure by one to promptly pursue arbitration, suggests that Zimmerman is

ineligible to obtain attorney fees and costs under the Rose Joint Venture's prevailing party provision. A waiver of a right to arbitrate does not waive the balance of the underlying agreement governing the parties' relationship. *Shepler Const., Inc. v. Leonard*, 175 Wn. App. 239, 245-46, 306 P.3d 988, 992 (2013).

Shepler Constr., Inc. v. Leonard, 175 Wn. App. 239 (2013) involved a dispute between a custom home builder and buyer. The contract included an arbitration provision. The Court held that both parties waived their right to arbitration by failing to compel arbitration in a timely manner. However, even with the waiver, the Court ruled that the contract had a prevailing party fee provision and said fees could be awarded after determination of who was the ultimate prevailing party following a remanded trial. *Id.*; *see also Ives v. Ramsden*, 142 Wn. App. 369 (2008) (the court relied on the underlying agreement of the parties even when arbitration was waived). In this regard, courts are generally loath to upset the terms of an agreement and strive to give effect to the intent of the parties. *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996).

Here, where the Court found that arbitration was waived, it should allow the prevailing party fee provision to survive and give it effect to carry out the intent of the parties. To do otherwise works an injustice on

Zimmerman and could lead to additional needless litigation by other parties under the May 5, 2011 Settlement Agreement emboldened to bring speculative claims against Zimmerman on the basis that such claimants will not risk having to pay Zimmerman's fees.

C. Zimmerman is entitled to an award of fees and costs while this action is pending on appeal.

After a final judgment a prevailing party may claim attorneys' fees and costs in the trial court while the other party pursues an appeal of the trial decision. See RAP 7.2(i). Specifically, RAP 7.2(i) provides as follows:

> The trial court has authority to act on claims for attorney fees, costs and litigation expenses. A party may obtain review of a trial court decision on attorney fees, costs and litigation expenses in the same review proceeding as that challenging the judgment without filing a separate notice of appeal…."

Therefore, Sharon's contention that the Court of Appeals has exclusive jurisdiction over Zimmerman' request in the trial court for an award in the amount of their attorneys' fees and costs under the Rose Joint Venture Agreements and the 2011 Settlement Agreement is incorrect.[14]

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[14] To be clear, Zimmerman is not appealing this Court's determination that CR 11 does not apply to Sharon's claims. Had Zimmerman chosen to do so, the Court of Appeals would have exclusive jurisdiction over that issue.

D. Zimmerman timely filed the motion for fees.

Civil Rule 54(d)(2) requires a party seeking attorney fees and expenses to file a motion "no later than 10 days after entry of judgment." In this regard, it is important to emphasize that February 27, 2015 Order Denying Defendants' Motion for Fees and Costs is a court *order*, not a *judgment*. (CP 247-48) Thus, the 10 day filing timeframe applicable to a motion for fees after a *judgment* does not apply to the *order* entered in this case, *i.e.*, the February 27, 2015 Order Denying Defendants' Motion for Fees and Costs. *O'Neill v. City of Shoreline*, 183 Wn. App. 15, 23, 332 P.3d 1099, 1104 (2014) (noting distinction between "judgment" and "order" for purposes of applicability of 10 day timeframe under Civil Rule 54(d)(2)).

Even assuming (but not conceding) that the Order Denying Defendants' Motion for Fees and Costs was a *judgment* (as opposed to an *order*), a party may file a motion outside of this 10-day timeframe absent a showing of prejudice by the nonmoving party. *O'Neill v. City of Shoreline*, 183 Wn. App. 15, 22, 332 P.3d 1099, 1103-04 (2014).

In this regard, *O'Neill v. City of Shoreline* provides:

> Neither party cited in its briefing what we consider to be the controlling authority, *Goucher v. J.R. Simplot Co.* In *Goucher*, the defendant filed a motion in limine the first day of trial, in violation of the time requirements of CR 6(d). Our Supreme Court rejected the plaintiff's contention

> that the trial court erred in considering the motion, stating, " 'CR 6(d) is not jurisdictional, and that reversal for failure to comply requires a showing of prejudice.' " A party establishes prejudice by showing "a lack of actual notice, a lack of time to prepare for the motion, and no opportunity to provide countervailing oral argument and submit case authority."

O'Neill v. City of Shoreline, 183 Wn. App. at 22 (footnote numbers omitted).

In this case, there is no prejudice to Sharon as a result of the timing of the filing of Defendants' Motion for Attorneys' Fees and Costs. Throughout this case, Sharon was on notice that Zimmerman would be seeking the payment of their attorneys' fees and costs incurred in the defense of this litigation.[15] The Agreements involved in the dispute clearly provide for an award of attorneys' fees and costs to the prevailing party. As a result, the Motion for Attorney's Fees and Costs should not be denied based on the timing of filing the motion.

VI. FEES AND COSTS ON APPEAL

Paragraph 8.10 of Rose Joint Venture Agreement and Paragraph 18 of the May 2011 Settlement Agreement both provide for an award of

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[15] *See* Defendants' Answer to Complaint and Affirmative Defenses, filed May 7, 2014 and Defendants' Answer to Third Amended Complaint, filed November 26, 2014. (CP 122-28)

attorneys' fees and cost to the prevailing party on any action thereon. (Ex. 33) Thus, pursuant to RAP 14.1 *et seq.* and RAP 18.1, Zimmerman requests, and should be entitled to, an award of attorney fees and expenses on appeal. *See*, *e.g.*, *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 51-54, 811 P.2d 673, 680-82 (1991); *Butzberger v. Foster*, 151 Wn.2d 396, 413-14, 89 P.3d 689 (2004). Likewise, Sharon should bear her own costs and fees on appeal.

VII. CONCLUSION

The trial court properly exercised its broad fact finding discretion and correctly applied these facts in dismissing the claims against Zimmerman. (CP 129-32) Any error was harmless and does not warrant reversal. This Court should affirm the trial court's decision to dismiss the claims against Zimmerman.

However, the trial court erred as a matter of law by denying Zimmerman attorneys' fees and costs as the prevailing party under the fee provisions in Paragraph 8.10 of Rose Joint Venture Agreement (Exs. 13 and 14) and Paragraph 18 of the May 2011 Settlement Agreement (Ex. 33). Consequently, this Court should reverse the trial court's February 27, 2015 Order Denying Defendants Motion for Fees and Costs (CP 247-48) (Appendix A) and related April 2, 2015 Order on Motion for Reconsideration of the Motion for Fees and Costs (CP 299) (Appendix B).

Zimmerman further requests that this Court direct the trial court to award Zimmerman attorneys' fees and costs as the prevailing party.

Respectfully submitted this 22nd day of July, 2015.

PETERSON RUSSELL KELLY PLLC

By _____
Marcia P. Ellsworth, WSBA no. 14334
Joshua D. Brittingham, WSBA no. 42061
mellsworth@prklaw.com
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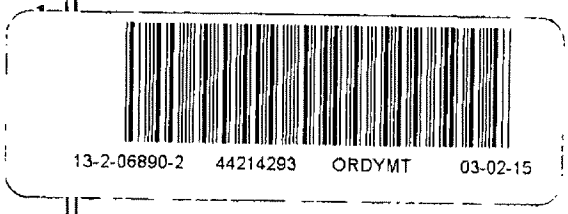
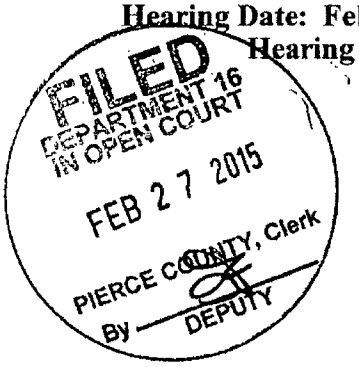
Attorneys for
Respondents/Cross-Appellants
10900 NE Fourth Street, Ste. 1850
Bellevue, WA 98004-8341

APPENDIX A



The Honorable Elizabeth Martin
Hearing Date: February 27, 2015
Hearing Time: 9:00AM



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

SHARON D. ROSE (formerly STANCLIF), IN HER CAPACITY AS Personal Representative of the Estates of Wilma W. Rose, deceased and Robert D. Rose, deceased, Plaintiff, v. JOHN C. ZIMMERMAN, JR., and SUSAN LaSALLE, and their marital community, and FNM CORP., a Washington corporation, Defendants.	No. 13-2-06890-2 ORDER DENYING DEFENDANTS MOTION FOR FEES AND COSTS ~~"PROPOSED"~~

THIS MATTER comes on before the Court of Defendants' Motion for Fees and Costs and the Court having considered the Motion, the Response of plaintiff and heard arguments of Counsel and being otherwise fully advised, it is:

ORDERED:

Ruthford & Woodbery, PLLP
2625 Northup Way, Suite 100
Bellevue, WA 98004
(425) 576-9660

3/3/2015 5726000616

The Motion is denied because the Court has previously denied the claim, the case is pending for an appeal brought by Plaintiff in Div. II of the Court of Appeals and this Court, the Defendants failed to file a cross appeal within the time allowed by RAP 5.2(a) and (RCW 4.16.080(2)) ~~and this Court lacks jurisdiction to decide this matter or the claim is barred by the doctrine of *res judicata*.~~ and further on the merits as the claims asserted at trial did not arise directly under either the Settlement Agreement or the Rose Joint Venture Agreement. Moreover, the provisions of RCW 4.16.310 Rose Joint Venture Agreement ~~Rule~~ as to arbitration ~~were waived~~ were not pursued.

Dated this 27 day of February, 2015.

Elizabeth Martin, Superior Court Judge

FILED
DEPARTMENT 16
IN OPEN COURT
FEB 27 2015
PIERCE COUNTY, Clerk
By DEPUTY

Presented By:

RUTHFORD & WOODBERY, PLLP

s/ John E. Woodbery
John E. Woodbery, WSBA# 8209
s/ William C. Ruthford

By:_____
William C. Ruthford, WSBA# 2215
Attorneys for Plaintiff

Copy received, approval as to form,
notice of presentation waived:

PETERSON RUSSELL KELLY, PLLC

Marcia Ellsworth WSBA 14334
Attorneys for Defendants

Ruthford & Woodbery, PLLP
2625 Northup Way, Suite 100
Bellevue, WA 98004
(425) 576-9660

APPENDIX B

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

SHARON D ROSE, Plaintiff(s) , vs. JOHN C ZIMMERMAN JR, Defendant(s) .	Cause No. 13-2-06890-2 **ORDER ON MOTION FOR RECONSIDERATION**

THIS MATTER having come on regularly before the above-entitled Court upon Defendants' Motion for Reconsideration of February 27, 2015 Order Denying Defendants' Motion for Fees and Costs, and the Court having reviewed the records and files herein, and being fully advised, it is hereby

ORDERED, that the Defendants' Motion for Reconsideration of February 27, 2015 Order Denying Defendants' Motion for Fees and Costs is DENIED.

DONE IN OPEN COURT this 2nd day of April, 2015.

JUDGE ELIZABETH MARTIN

PETERSON RUSSELL KELLY PLLC

July 22, 2015 - 4:24 PM

Transmittal Letter

Document Uploaded: 2-471019-Respondents Cross-Appellants' Brief.pdf

Case Name: Rose v. Zimmerman

Court of Appeals Case Number: 47101-9

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Respondents Cross-Appellants'
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Ana Maria Garnier - Email: agarnier@prklaw.com

No. 47101-9-II

Pierce County Superior Court Cause No. 13-2-06890-2

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JOHN C. ZIMMERMAN, SUSAN LASALLE, and FNM CORP., INC.
Respondents/Cross-Appellants

v.

SHARON D. ROSE (formerly STANCLIFF), in her capacity as Personal Representative of the Estates of Wilma W. Rose, deceased, and Robert E. Rose, deceased,
Appellant/Cross Respondent.

DECLARATION OF SERVICE

Peterson Russell Kelly PLLC
Marcia P. Ellsworth, WSBA 14334
Joshua D. Brittingham, WSBA 42061
Attorneys for Respondents/Cross-Appellants
John C. Zimmerman, Susan Lasalle, and FNM Corp., Inc.

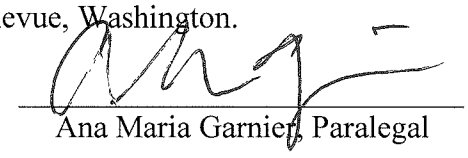
1850 Skyline Tower, 10900 NE 4th St.
Bellevue, WA 98004
(425) 462-4700

I, Ana Maria Garnier, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: I am employed with the law firm of Peterson Russell Kelly PLLC, I am a resident of the State of Washington, over the age of eighteen (18) years, not a party to this action, and am competent to be a witness herein.

I hereby certify that on July 22, 2015, I caused to be served a copy of JOHN C. ZIMMERMAN, SUSAN LASALLE, AND FNM CORP., INC.'S CROSS-APPELLANTS/RESPONDENTS' BRIEF and this Declaration of Service to all parties of record and the Court of Appeals via the methods indicated below:

Attorney For Cross-Appellee/Appellant: William C. Ruthford John E. Woodbery 2625 Northup Way, Ste 100 Bellevue, WA 98004	Via: [X] Via Electronic Service to woodberylaw@gmail.com and bill@ruthfordlaw.com.
Court of Appeals, Division I 600 University St Seattle, WA 98101-1176	(X) Original E-filed ( ) Hand Delivered ( ) Fax

Dated: July 22, 2015, at Bellevue, Washington.



Ana Maria Garnier, Paralegal

PETERSON RUSSELL KELLY PLLC

July 22, 2015 - 4:25 PM

Transmittal Letter

Document Uploaded: 2-471019-Dec of Service.pdf

Case Name: Rose v. Zimmerman
Court of Appeals Case Number: 47101-9

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Brief: ____
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ◉ Other: Declaration of Service

Comments:

No Comments were entered.

Sender Name: Ana Maria Garnier - Email: agarnier@prklaw.com